UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BASHAS' INC. D/B/A BASHAS' FOOD CITY, AND A.J.'S FINE FOODS	
	28-CA-21435
AND	28-CA-21501
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 99	
	28-CA-21590
AND	28-CA-21592
	28-CA-21639
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION	28-CA-21640
	28-CA-21646
	28-CA-21676
	28-CA-21739
	28-CA-21785
	28-CA-21803
ATLANTIC SCAFFOLDING COMPANY	
AND	16-CA-26108
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 502	
JACKSON HOSPITAL CORPORATION AND JOINERS OF AMERICA, LOCAL 502	
	9-CA-42249
AND	9-CA-43128
	9-CA-43165
UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	9-CA-43397

RESPONDENT ATLANTIC SCAFFOLDING COMPANY'S BRIEF RECOMMENDING CONTINUED APPLICATION OF SIMPLE INTEREST TO BACKPAY AWARDS

RESPONDENT ATLANTIC SCAFFOLDING COMPANY'S BRIEF RECOMMENDING CONTINUED APPLICATION OF SIMPLE INTEREST TO BACKPAY AWARDS

The Board has invited the parties in the above-captioned cases to file briefs addressing whether it should abandon the practice, to which it has long-adhered, of assessing simple interest on backpay remedies. Atlantic Scaffolding Company ("Atlantic") recommends that the Board continue its current practice because deviating to a compound interest framework would result in the inequitable administration of the National Labor Relations Act ("Act"). In any event, the rulemaking process—not adjudication and retroactive application—is the proper means for effectuating such a complete reversal of the Board's policy and practice.

A. The Board Should Not Abandon its Practice of Assessing Simple Interest in Favor of Adopting a Compound Interest Model

For approximately two decades now, the Office of the General Counsel has sought to convince the Board to begin applying compound interest to backpay remedies. *See Alaska Pulp Corp.*, 300 NLRB 232, n.4 (1990). And for nearly two decades—covering administrations on both sides of the aisle—the Board has "duly considered" and declined the General Counsel's overtures on the issue. *See id.*; *see also, e.g.*, *ADF, Inc.*, 355 NLRB No. 14, slip op. at n.4 (2010). There is no compelling reason for the Board to alter the course it has charted.

While it is clear that the Act is "essentially remedial," an appropriate remedial framework is already in place. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1941). Under current Board practice, persons adjudged to be entitled to backpay already receive interest in the amount of the short-term Federal rate plus an additional three percent. *See New Horizons for the Retarded, Inc.*, 283 NLRB 1173, 1173 (1987). This framework has served the Board well, effectuating the goal of properly compensating aggrieved employees while balancing the equally important need to avoid punitive awards and prevent windfall recoveries. If the current framework had not effectively carried out the purposes of the Act, there can be little doubt that the Board would

have taken action in the past 20 years to alter it.[1] The Board's experience and the longevity of its current backpay practice—attained under nearly constant scrutiny—should not be ignored. Instead, these factors are indicative of the value in continuing with the Board's practice of applying simple interest.

Moreover, compounding interest on monetary awards would essentially penalize the respondent company (or union) for the often protracted nature of unfair labor practice cases. While it is true that most administrative agency processes are not swift, this fact is hardly a sound basis on which to justify leaving the respondent with the proverbial "bag" as interest not only accrues, but compounds. The inequity is most apparent when the General Counsel fails to prove his case at the region level, only to appeal to the full Board, which must place the case in a lengthy queue before either adopting or vacating the decision of the ALJ. Especially after already winning its case, the respondent should not be forced to continue to bear the cost, through compounded interest, of further administrative proceedings that are required as a result of the failure of the General Counsel's case in the first place. To the extent that the General Counsel may point the finger at the ALJ, the logic is unchanged—it is the administrative agency, not the respondent, that is responsible for the protraction. It is simply inequitable for the Respondent to be required to pay for it on a compounded basis.

Finally, any blanket rule that compound prejudgment interest should be assessed on backpay awards goes beyond what federal courts have been willing to impose under statutes, such as Title VII of the Civil Rights Act of 1964, that have remedial provisions patterned after the Act. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). Title VII does not establish a per se entitlement to compound prejudgment interest on backpay awards. *See*

[1] Notably, in 1992, the Board published a notice of proposed rulemaking concerning the imposition of compound interest on monetary awards. *See* 57 Fed. Reg. 7897-7900 (1992). The Board ultimately withdrew the notice in 1998 and declined to alter its current practice of applying simple interest. *See* 63 Fed. Reg. 8890-91 (1998).

generally 42 U.S.C. § 2000e, *et seq*. Instead, courts are vested with wide discretion as to how—or even whether—such interest should be awarded in a particular case. *See EEOC v. Rath Packing Co.*, 787 F.2d 318, 333 (8th Cir. 1986), *cert denied.*, 479 U.S. 910 (1986); *O'Quinn v. New York Univ. Med. Ctr.*, 933 F. Supp. 341, 344-45 (S.D.N.Y. 1996). Federal courts have not been reluctant to exercise this discretion to deny prejudgment interest altogether, much less to refuse to compound the interest awarded. *See Rath Packing*, 787 F.2d at 333; *Philipp v. ANR Freight Sys., Inc.*, 61 F.3d 669, 675-76 (8th Cir. 1995) (affirming denial of prejudgment interest when the district court based its decision, in part, on the fact that "liability was far from clear"). Adopting a policy of "routinely" compounding interest would not bring the remedial framework of the Act into harmony with Title VII but, rather, would impose a blanket rule that federal courts have not been willing to recognize in the analogous employment discrimination context.

B. Any Change in the Board's Practice Regarding the Assessment of Interest Should Come Via the Rulemaking Process, Not Adjudication and Retroactive Application

The Board should not reverse its practice of assessing only simple interest on monetary remedies through adjudication of the above-captioned cases. For 23 years, the Board has applied simple interest to backpay awards and, for nearly as long, has repeatedly rejected invitations to replace that practice with a compound interest model. It would be improper and inequitable for the Board to now reverse this long-followed practice outside of a rulemaking process under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. *See Pfaff v. HUD*, 88 F.3d 739, 748 (9th Cir. 1996) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), and stating that agency may abuse its discretion when adopting, through adjudication instead of rulemaking, new standards that depart radically from prior rules that have been substantially relied-upon).

"Rulemaking is generally a better, fairer, and more effective method of announcing a new rule than ad hoc adjudication." *Community Television of S. Cal. v. Gottfried*, 459 U.S. 498

(1983). Indeed, specific to whether the Board should begin imposing compound interest on backpay awards, Member Truesdale agreed during his time on the Board that rulemaking—not adjudication—would be the more appropriate mechanism for addressing the issue. *See Accurate Wire Harness*, 335 NLRB 1096, 1096 n.1 (2001). More to the point, Atlantic contends that it would be simply improper for this 180 degree change in Board policy to be adopted through adjudication of any of the above-captioned cases. *See Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981) (setting aside order issued through agency adjudication where new rule changed existing law and had "widespread application," holding that the matter should have been "addressed by rulemaking"). Compliance with the APA—including a proper notice and comment procedure—is fundamental to the Board adopting any policy of assessing compound interest in the face of two decades of decisions in which it has flatly refused to do so.

Moreover, even if the Board overruled its prior practice of assessing only simple interest, it would not be proper for the Board to retroactively apply such a rule to Atlantic. To do otherwise would be wholly inequitable, as Atlantic was entitled to rely on the simple interest practice the Board has followed since 1987. *See Pfaff*, 88 F.3d at 748 n. 4 (holding that, while retroactive application may not be inequitable per se, "this problem grows more acute the further the new rule deviates from the one before it"); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950-53 (9th Cir. 2007) (applying balancing test announced in *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), and holding that retroactive application of new rule developed in agency adjudication was impermissible under the circumstances). The Board should not adopt a practice of assessing compound interest on backpay remedies, and certainly should not do so in the context of the above-captioned cases.

C. Conclusion

For these reasons, Atlantic Scaffolding Company respectfully recommends that the Board continue its practice of assessing simple interest on backpay remedies under the Act.

Dated: June 24, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2010, a true and correct copy of RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS was electronically filed and served on the following persons via e-mail:

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